MGT 388 HANDOUT: THE LAW OF TORT (AND THE TORT OF NEGLIGENCE)

Tort = *"A civil wrong for which the remedy is a common law action for un-liquidated damages, and which is not exclusively the breach of a contract, or the breach of a trust or other merely equitable obligation"* Salmond

The law of tort is concerned with situations where the activity of one member of society, actually or potentially, harms another (but it is not concerned with those events which would be classified as criminal, although there are some torts which may have a twin in the criminal law eg Assault). The harm can take the form of physical harm, damage to property or financial harm. The law of Tort provides mechanisms by which such disputes can be resolved. In other words, tort law sets standards by which individuals are expected to behave, although it leaves it to the wronged individual to do something about it. Generally in such actions the claimant is seeking damages. Any damages awarded go to the claimant, who may choose to use the money to put matters right, or equally may choose to use the money for some other purpose, what the individual does with their damages is no business of the courts.

The law of tort is very different from the law of contract, where the parties create their own obligations. In the law of tort the law imposes expectations upon each of us regulating the behaviour of individuals even where they are not intentionally responsible for any loss suffered. The range of torts includes: Trespass to land, Trespass to the person, Nuisance (public and private), Defamation etc, etc, but the most significant area of tort in the 21st Century is the tort of ***Negligence***.

A further distinction between Contract and tort lies in relation to the remedies which are available. As you have already seen, remedies in contract law seek to put the innocent party in the same position as if the contract had been performed, ie projecting them forward in terms of satisfaction, whereas the remedy in tort
(damages) seeks to **restore the innocent party, as far as is possible to the position he was in before the tort was committed.**

Contract and tort can be further distinguished in that, as a general rule, a claimant cannot recover damages in tort for purely economic loss, whereas in contract law the primary function is to protect economic interests.

At its most simple "tort" simply means a "wrong" or "wrongful act". In a legal context a "tort" is a civil wrong. Normally it is also possible to state that it is a "civil harm". A claimant can only claim where he can show that he has suffered harm or loss as a result of the defendant's wrongful act. It is important to bear in mind when looking at "tort" that not every act which leads to a loss being suffered will be said to be wrongful, it must fall within one of the established categories of tort. Further, the claimant can only sue if the loss is one which is capable of being compensated in law. For example, generally a claimant who suffers purely economic loss due to a defendant's negligence cannot recover damages for that loss in negligence.

A claimant can successfully bring an action in tort if he/she can show that they have suffered a recognised type of damage because of conduct of the defendant which the law recognises as harmful. Like contract, tort is largely governed by the common law, making it organic in nature and capable of developing and growing in response to societal change – see the growth of negligence in particular. This can provide flexibility leaving some things open to wide interpretation by the courts, but it can also allow for policy issues to be taken into account in the decision making process. Most notably perhaps should one or other of the parties have taken out insurance to protect against such a loss?

Response to changing social conditions – see

Donoghue v Stevenson (1932) AC 562
Hedley Byrne v Heller [1964] AC 465

This flexibility can lead to great uncertainty, and uncertainty itself may lead more cases to be taken to court.

NEGLIGENCE

Although the roots of negligence predate the 20th century the development of the tort and its growth is largely a product of the 20th century. The tort of negligence is concerned with damage experienced by the claimant as a result of the defendant's failure to take reasonable care. Focus is on the manner in which the claimant suffered the harm.

Types of harm covered by negligence are broad, ranging from physical harm to persons or property, through witnessing a relative's injury, medical harm, financial loss, to damage as a result of using a defective product.

An increase in our appetite for litigation in relation to acts of negligence has led the courts in some instances to restrict liability in to avoid what is referred to as the 'floodgates' opening. It is arguable that this has left the law uncertain in some areas.

Note, the key element of tort is that it is a balancing of previous law with present facts and policy.

Definition of Negligence

"The defendant is liable for all damage caused by his breach of duty to take reasonable care, provided that that damage is not too remote."

The following elements must be shown:-

1) a duty of take care;
2) a breach of that duty;
3) damage to the plaintiff;
4) a causal link between that damage and the breach of duty;
5) the damage must not be too remote.

Each of these elements must be proven in turn, it is not a 'pick and mix' scenario. Put simply, if the is no duty of care then it matters not what else on the check list may be proven.

DUTY OF CARE

Classical definition of negligence:

> *Donoghue v Stevenson* (1932) AC 562
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> "The rule that you are to love your neighbour becomes in law: You must not injure your neighbour, and the lawyer's question "who is my neighbour" receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question".

A two stage test was then developed in the case of *Anns v Merton* [1978] AC 728, per Lord Wilberforce

1) Firstly is there a sufficient relationship of proximity that the defendant might reasonably contemplate that his carelessness would cause harm to the plaintiff?

2) Secondly, if the answer is yes, are there any considerations which ought to negate, reduce or limit the scope of the duty?

In the case of *Caparo v Dickman* [1990] 2 WLR 538 per Lord Oliver stated that;

"A duty of care would only be imposed if:-

a) it was foreseeable that negligence by the defendant would harm the plaintiff and
b) there was a sufficiently close relationship between the plaintiff and defendant to justify imposing the duty of care; and
c) it would be just and reasonable in all the circumstances to impose a duty of care."

This was approved in *Murphy v Brentwood District Council* [1990] 2 All ER 908.
See *also Law Society v KPMG Peat Marwick* [2000] 4 All ER 540 for a clear application of the *Caparo* test.

Although the Caparo test looks very similar to that in *Anns* it is subtley difference. *Caparo* replaces *Anns* as a precedent which tells us that the courts think that the test is rather different. The difference lies in the feel of each approach. *Anns* seems almost to suggest that we should presume a duty, unless there is good reason why there should not be, and governed over a period of expansion in the circumstances when/where the courts would consider there to be a duty of care. After *Caparo* the question of when/where a duty of care would arise seems to have contracted rather leaving the current definition more restrictive.

See also *Commissioners of Customs and Excise v Barclays Bank plc* [2006] UKHL 28.

The question for the court is usually:

“Did this defendant owe a duty to this plaintiff to take care to avoid causing this type of injury inflicted in this particular way?”

In order to answer this question we will always need to look at the particular circumstances of the case.

For example

a) The nature of the act causing the loss, eg should a defendant be liable for careless words?
b) The nature of the loss suffered, eg liability for nervous shock or pure economic loss?
c) The parties involved, e.g. policy considerations may affect the liability of a local council, or a doctor or a lawyer, e.g. *Hill v Chief Constable of West Yorkshire* [1989] AC 53, HL.

Liability for physical injury can generally be applied un-problematically under the normal principles of duty of care. Other types of loss, however, require closer pre-existing relationships between claimant and defendant.

Liability for Causing Pure Economic Loss

Liability in negligence for pure economic loss is an area of law subject to particular controversy and change. The law is less willing to impose a duty of care.

Weller v Foot and Mouth Disease Research Institute [1966] 3 All ER 560.
Spartan Steel and Alloys Ltd v Martin & Co Ltd [1973] QB 27.
Junior Books Ltd v Veitchi Ltd [1983] AC 520.
Ultramares v Touche [1931] 174 NE 441.

Consider the undesirability of exposing defendants to potential liability for an, “indeterminate amount to an indeterminate class.”

Negligent Misstatement

In relation to negligent statements, words can be relied upon innumerable times, but see –

Hedley Bryne v Heller [1964] AC 465.

Proximity, relationship, reasonable reliance.

Caparo Industries v Dickman [1990] 2 WLR 358

Confirmed liability may be found when;

"The defendant knew that his statement would be communicated to the plaintiff either as an individual or as a member of an identifiable class, specifically in connection with a particular transaction or transactions of a particular kind.... and that the plaintiff would be very likely to rely on it for the purpose of deciding whether or not to enter on that transaction or a transaction of that kind." per Lord Bridge.

James McNaughton v Hick Anderson [1991] 1 All ER 134

Look for the following factors;

1) The purpose for which the statement was made;
2) The purpose for which the statement was communicated;
3) The relationship between the maker of the statement, the recipient and any intermediary;
4) The size of the class of persons to which the plaintiff belongs;
5) The state of knowledge of the defendant;
6) Was it reasonable for the complainant to rely on the statement?

Liability found for statements made to an identifiable bidder

Morgan Crucible v Hill Samuel Bank [1991] 1 All ER 148.

Who may be found liable for negligent misstatements?

Mutual Life Assurance v Evatt [1971] AC 793
Esso Petroleum v Mardon [1976] 1 QB 801
Lennon v Metropolitan Police Commissioner [2004] 2 All ER 266

Social occasions;

Chaudry v Prabhaker [1988] 3 All ER 718

Howard Marine and Dredging Co Ltd v A Ogden and Sons [1978] QB 574; as per Lord Denning who would exclude, "..representations made during a casual conversation in the street, or a railway carriage, or an opinion given offhand or off the cuff on the telephone."

Losses suffered by third parties.

Smith v Eric S Bush [1990] 1 AC 829
Ross v Caunters [1980] Ch 297 *White v Jones* [1995] 2 AC 207
Carr-Glynn v Frearsons [1998] 4 All ER 225 CA
Williams v Natural Life Health Foods Ltd [1998] 2 All ER 577
Hamble Fisheries Ltd v L Gardner & Sons ('The Rebecca Elaine') [1999] 2 Lloyd's Rep 1
Hooper v Fynmores (A Firm) (2001) The Times 19 July Chancery Division

Liability of Accountants

Royal Bank of Scotland plc v Bannerman Johnstone Maclay (a firm) [2003] SLT 181
Sayers v Clarke-Walker (a Firm) [2002] BCLC 16

Nervous Shock.

Another growing area where the law has been reluctant to impose a duty of care is that concerning psychiatric injury or nervous shock. One reason for this may be because of the difficulty in establishing such an injury, another, fears of opening the floodgates of liability.

Damages for nervous shock were only recoverable at first as a consequence of physical injury - see *Dulieu v White* [1901] 2 KB 669

The most significant recent cases are:

McLoughlin v O'Brien [1982] 2 All ER 298,
Alcock v Chief Constable of South Yorkshire [1991] 4 All ER 907.
Frost v Chief Constable of South Yorkshire [1997] 1 All ER 540 (reversed in White below)
White and Others v Chief Constable of South Yorkshire Police and Others [1999] 1 All ER 1
French v Chief Constable of Sussex [2006] EWCA Civ 312

In McLoughlin, a mother, recovered when she saw her family in hospital after a car accident. One of her children was killed and the other two and her husband were badly injured. She was not present when the accident happened but was told about it two hours later. This could have been a bar to her success but the House of Lords agreed that the defendant's nervous shock was a foreseeable.

The House of Lords in *Alcock* based liability on foreseeability of nervous shock, but also imposed a requirement of proximity.

The case was brought after the disaster at Hillsborough football stadium in Sheffield. The police allegedly allowed too many latecomers into one end of the ground, an act which led to others at the front of a stand being crushed to death against a fence erected to stop fans running on to the pitch. Relatives of the victims claimed damages for nervous shock. It was held that only parents and spouses of victims who had seen the disaster with their own eyes or who had come across the immediate aftermath could recover

BREACH OF DUTY

The imposition of a duty does not mean that the defendant will automatically be liable. A defendant is only liable if he can be shown to be at fault. This is determined by assessing the **standard of care** required in any given situation.

"Negligence is the omission to do something which a reasonable man would do, or doing something which a prudent and reasonable man would not do."

> *Blyth v Birmingham Waterworks Co.* (1856) 11 Exch 781

The standard of care is that of the ***reasonable man***. The test adopted is an objective one. The court is not concerned with the particular person involved, but with what the reasonable man would have done.

Reasonable Man

> *Nettleship v Weston* [1971] 2 QB 691

Physical characteristics, age, infirmities.

Reasonable Businessman

The standard required of a defendant businessman or professional is that of the reasonable person pursuing that particular business or profession. No allowance is made for an individual's personal lack of skill. He will only be judged as a specialist if he holds himself out as being a specialist.

> *Bolam v Friern Hospital Committee* [1957] 2 All ER 118

Roe v Minister of Health [1954] 2 QB 66
Bolitho v City and Hackney Health Authority [1997] 39 BMLR 1, HL
Penney v East Kent Health Authority (2000) 55 BMLR 63
Shakoor v Situ [2000] 4 All ER 181

Denning, "We must not look at a 1947 incident with 1954 spectacles."

A defendant is not liable if he followed a course of action accepted in that profession.

Whitehouse v Jordan [1981] 1 All ER 267

Use of expert witnesses.

To avoid harm occurring the reasonable man will be expected to take the following precautions.

a) Assess the magnitude of the risk.

   Consider likelihood of harm eg *Bolton v Stone* [1951] 1 AC 850

   Evaluate the severity of the damage eg *Paris v Stepney* [1951] AC 367

b) Consider the social value of carrying on with the act – the defendant's purpose eg *Watt v Hertfordshire County Council* [1954] 1 WLR 835

c) Consider the cost of eliminating the risk.

   Would it be reasonable to incur the cost of precautions necessary to absolutely avoid the risk of harm?

   Perry v Harris [2008] EWCA Civ 907

d) Conformity with standard practice.
   Burden of proof rests with the claimant who must prove negligence on the **balance of probabilities**

CAUSATION & REMOTENESS

"All these three, - duty, remoteness and causation, are all devices by which the courts limit the range of liability for negligence. Sometimes it is done by limiting the range of persons to whom a duty is owed. Sometimes it is done by

saying there is a break in the chain of causation. All these devise are useful in their way. But ultimately it is a question of policy for the judge to decide."

Denning MR in *Lamb v Camden LBC* [1981] QB 625.

Causation.

It must be established that the loss complained of by the claimant was caused by the defendant's act. The courts apply what is sometimes know as the "but for" test to ascertain whether there is *causation in fact* - i.e, *would the damage have occurred* ***but for*** *the defendant's negligence?*

"If the damage would not have happened but for a particular fault then that fault is the cause of the damage - if it would have happened just the same, fault or no fault, the fault is not the cause of the damage."

per L Denning in, *Cork v Kirby MacLean* [1952].

Barnett v Chelsea and Kensington Hospital Management Committee [1969] 1 QB 4282

Where there is more than one cause for the claimant's loss causation may prove more difficult.

Wilsher v Essex Area Health Authority [1988] 2 WLR 557
McGee v National Coal Board [1972] 3 All ER 1008
Fairchild v Glenhaven Funeral Services [2002] IRLR 129
Chester v Afshar [2004] 4 All ER 587
Gregg v Scott [2005] UKHL 2
Barker v Corus [2006] UKHL 20

See also S3 Compensation Act 2006

Novus Actus Interveniens

Remoteness

The defendant will not be held liable for every consequence of his negligent act. Some damage may be considered to be too remote a consequence of the defendant's actions.

Whether damage is too remote depends on whether it is reasonably foreseeable. The law will only impose liability for the kind of harm which is reasonably foreseeable.

"The essential factor in determining liability is whether the damage is of such a kind as the reasonable man should have foreseen"

- Per Viscount Symmonds in The Wagon Mound (No. 1) [1961] 2 WLR 126

Jolley v Sutton London Borough Council [2001] 1 WLR 1082

Method of infliction irrelevant.

Hughes v Lord Advocate [1963] AC 837

Extent of Injury

"thin/eggshell skull rule" - where the claimant suffers a foreseeable personal injury which is exacerbated by a pre-existing physical problem, the defendant must take his victim as he finds him. He is liable for the full extent of the damage, even where the damage is more extensive or of a different kind than is foreseeable.

The rule only applies where some initial damage, however slight, is reasonably foreseeable.

Smith v Leech Brain & Co. Ltd [1962] 2 QB 405.

Remedies

Principle remedy is that of damages. The function of damages in tort is **to put the claimant back** into the position he was in before the tort was committed. (Contrast with contract law, and note potential difficulties with economic loss).